No. 88-1847

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FORD MOTOR CREDIT COMPANY,
Appellant,

v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Appellee.

On Appeal from the District Court of Appeal of Florida, First District

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REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

Florida does not dispute that its tax on intangible property, considered as a whole, fails the internal consistency test—a standard that this Court repeatedly has identified as one prerequisite for compliance with the Commerce Clause. The state's effort to save the tax despite that constitutional infirmity proceeds along three analytical paths.

First, the state attempts reconstructive surgery. It splits the tax in two (calling one part a "business situs intangible tax" and the other a "domiciliary intangible tax") (Br. 7-9), reshapes the "business situs" tax by interpreting "sale" to mean something other than a transfer of ownership (Br. 7), and then pronounces the bifurcated and reformulated "business situs" tax (when "considered without regard to the tax on domiciliaries") "internally consistent." Br. 16. The state's semantical shell game, for which there is no basis in the statute, serves only to emphasize, not to conceal, the facially discriminatory fea-

ture of the intangible property tax. Because Florida domiciliaries engaged in intrastate commerce enjoy a kind of "multiple activities" exemption, under which they pay either the "domiciliary intangible tax" or the "business situs intangible tax" but never both, the rewritten statute is indistinguishable from those struck down in *Armco* and *Tyler Pipe*. Just as in those cases, Florida's taxing scheme overtly discriminates against those engaged in interstate commerce, who receive no comparable protection against multiple taxation.

Second, the state disparages the internal consistency test, urging the Court in effect to discard it as an instrument of Commerce Clause analysis in this case. But the state's argument rests on the erroneous assumption that subjecting interstate commerce to a discriminatory *risk* of double taxation, as opposed to actual double taxation, is constitutionally benign. This Court's decisions recognize that even the threat of multiple taxation imposes costs that can interfere with free trade among the states. Moreover, an actual double taxation standard not only would necessitate an impractical inquiry into the constantly changing tax laws of many other states, but also would produce a patchwork in which a logically defective tax would apply to some interstate businesses and not to others, depending on the identity of the other states in which they do business.

Third, in a frontal assault on the most fundamental of Commerce Clause precepts, the state asserts that intangible property arising out of interstate commerce may properly be subject to cumulative unapportioned taxation by every state that contributes to its value. The state's theory is grounded in a misunderstanding of this Court's due process decisions: while they hold that more than one state may provide benefits and protections to the same intangible property sufficient to confer taxing jurisdiction, they do not address the need for apportionment in such circumstances, nor do they consider any question of interference with interstate commerce. Under the Court's Commerce Clause decisions, when a tangible or

intangible asset has a taxable nexus with more than one state, apportionment is required precisely to *avoid* multiple taxation of interstate commerce.

We address each of these points in turn. We also answer the state's belated argument that appeal does not lie in this case because the judgment under review, though concededly "entered" (for purposes of the statutory savings clause) before the change in this Court's mandatory appellate jurisdiction took effect, gave rise only to an "inchoate" appeal right that did not ripen until after denial of discretionary review by the Florida Supreme Court.

I. THIS COURT SHOULD REVIEW THE TAX ACTUALLY IMPOSED BY THE FLORIDA LEGISLATURE, NOT THE REFORMULATED VERSION PUT FORWARD BY APPELLATE COUNSEL

In its effort to portray the Florida tax as internally consistent, the state performs an "act of mental gymnastics," *Nippert v. City of Richmond*, 327 U.S. 416, 423 (1946), first bisecting the tax into two supposedly separate taxes and then construing one of those two taxes to eliminate a feature that would otherwise make it internally inconsistent even standing alone. The state has no legitimate basis for rewriting the statute to suit its litigation objectives.

Florida's tax on intangible property is levied under a single section of a single statute. Fla. Stat. § 199.032 (1983). The state cites neither a textual basis in that statute nor a judicial or administrative interpretation to support its bifurcation of the tax into a "domiciliary" tax and a "business situs" tax. The state court decisions applying the tax give not the slightest hint that the statute imposes two taxes rather than one. *See, e.g., Florida Steel Corp. v. Dickinson*, 328 So. 2d 418 (Fla. 1976); *State ex rel. Seaboard Air Line R. Co. v. Gay*, 35 So. 2d 403 (Fla. 1948) (en banc); *Starkey v. Carson*, 189 So. 385 (Fla. 1939).

Nor is there any foundation for the state's reconfiguration of the "business situs" definition. The statute provides that intangible property has a "business situs" in Florida if it arises out of a "sale" of personal property in the state. Fla. Stat. § 199.112(1) (1983). "Sale" ordinarily means a transfer of ownership. Until 1977, the state believed that it had no authority under that provision to tax intangibles arising out of a sale "with an f.o.b. point other than Florida." J.S. App. 12; *see also* J.A. 7. In that year, the legislature added a new sentence to the statute specifying that a sale is "in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale." Fla. Stat. § 199.112(1) (1983). The legislature sought to "prevent out-of-state sellers [from] avoiding the intangibles tax by shipping goods into Florida from an FOB point out of the state." Fla. H. Rep. Comm. on Finance & Taxation, Fiscal Note No. 2256 (Apr. 29, 1977). It anticipated that the change would give "Florida producers . . . a slight competitive advantage." *Id.* The amendment plainly was intended to expand the reach of the tax, not to constrict it.

The state apparently recognizes that the resulting "business situs" definition, even standing alone, violates the internal consistency test. If every state were to adopt the same provision, an interstate company would pay two taxes on the full value of its intangible property, one to the state in which the underlying sale takes place and one to the state to which the property is delivered; an intrastate company whose sales and deliveries take place in a single state would pay only one tax. Florida therefore asserts, for the first time since this litigation began and in conflict with its position in the state administrative proceeding, that the statute does "not treat sale and delivery as alternative bases for finding a business situs" and that a transfer of ownership within the state does not qualify as a "sale" if "delivery was to occur outside Florida as part of the sale." Br. 24.[1] The state cites nothing to

[1] Ford specifically asked the state in an interrogatory whether the tax applies to an intangible arising out of a sale in Florida if "the property is shipped from Florida (F.O.B. Florida) to another

support its bare declaration that the 1977 legislation, instead of expanding the reach of the state's intangible property tax, actually narrowed it by excluding transfers of ownership within the state.

Although the Court should view skeptically the state's eleventh-hour statutory reconstruction, the definition of "business situs" is not central to the issues in this case. Even if Florida's current interpretation were accepted, the statute would remain internally inconsistent. If the same statute were enacted by every state, an interstate company would still pay multiple taxes on the same intangible property—one to its state of domicile and another to the state in which the underlying tangible property was delivered—while an intrastate company would pay only a single tax to its state of domicile. The state's redefinition of "business situs" would mean only that an interstate company in such circumstances would not have to pay a third tax to the state in which the sale itself took place. Double taxation of interstate commerce is no more permissible than triple taxation.

II. FLORIDA'S TWO-TAX THEORY BRINGS THIS CASE SQUARELY WITHIN *ARMCO* AND *TYLER PIPE* AND THUS CONFIRMS THAT ITS TAXING SCHEME IS INVALID

Far from masking the statute's constitutional defect, dividing the tax into a "business situs intangible tax" and a supposedly separate "domiciliary intangible tax" merely accentuates its facial discrimination against interstate commerce. Under the state's theory, a Florida

state pursuant to the terms of the contract for sale." J.A. 13. The state responded that the tax would apply. J.A. 18. It now says that its interrogatory response was intended to address only the "domiciliary" tax, which applies to all intangibles owned by a Florida domiciliary "without regard to business situs." Br. 7 n.5. But the interrogatory obviously focused on the state's definition of "business situs." The state's current reading of the response makes its nonsensical. Since domicile alone is always a sufficient basis under the Florida statute for taxing an intangible, it would have been no answer to Ford's questions about business situs to respond solely in terms of the tax on domiciliaries.

domiciliary engaged in purely intrastate commerce never pays more than one of those two taxes. For example, a local bank that finances an automobile in Florida pays only the "domiciliary" tax; it pays no "business situs" tax, even though the intangible has a Florida "business situs." By contrast, an out-of-state company competing with the Florida bank must pay the "business situs" tax regardless of whether it pays a domiciliary tax to its home state.

That makes this case indistinguishable from *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984). West Virginia imposed a wholesale gross receipts tax but exempted local manufacturers who were subject to a separate manufacturing tax. The result was that "two companies selling tangible property at wholesale in West Virginia will be treated differently depending on whether the taxpayer conducts manufacturing in the State or out of it." *Id.* at 642. Moreover, "[i]f Ohio or any of the other 48 States imposes a like tax on its manufacturers—which they have every right to do—then [manufacturers] from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax." *Id.* at 644.

At issue here is a property tax, not a transactional tax, but the practical effect is identical. Two companies financing sales of tangible property in Florida are treated differently depending on whether the taxpayer is a Florida domiciliary or an out-of-state domiciliary. Only the latter pays Florida's "business situs" tax; the former is exempt. Likewise, if any other state were to impose a domiciliary tax like Florida's, a company domiciled in the other state would pay both a domiciliary tax to its home state and a business situs tax to Florida on the same intangible property, while a Florida domiciliary would pay only the Florida domiciliary tax. As in *Armco*, the statute here facially discriminates against interstate commerce in favor of intrastate commerce.

Inverting the exemption makes no difference. If Florida domiciliaries are considered exempt from the

"domiciliary" tax rather than from the "business situs" tax, the case becomes indistinguishable from *Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987). As in *Armco*, the state in *Tyler Pipe* imposed both a manufacturing and a wholesaling tax and provided that local manufacturers subject to one need not pay the other. Unlike West Virginia, however, Washington exempted local manufacturers from the manufacturing tax rather than from the wholesaling tax. Despite that difference in form, the Court concluded that the Washington scheme "has the same facially discriminatory consequences as the West Virginia exemption we invalidated in *Armco*." *Id.* at 240. The statute "exposes manufacturing or selling activity outside the State to a multiple burden from which only the activity of manufacturing in-state and selling in-state is exempt." *Id.* at 248.

The same is true here. Florida's statute exposes to multiple tax burdens companies that have an out-of-state domicile or whose intangibles have an out-of-state business situs. It exempts from that multiple burden only Florida domiciliaries whose intangibles have an in-state business situs. As in *Tyler Pipe*, the Florida scheme impermissibly "eliminat[es] the risk of multiple taxation" only for Florida companies engaged in intrastate commerce, but not for "similarly situated" companies engaged in interstate commerce. *Id.* at 246.[2]

[2] Florida seems strangely blind to the obvious parallel. It describes *Tyler Pipe* in these words: "Washington required all out-of-state manufacturers to pay a tax when they sold their goods in the state, without offset for any manufacturing tax they incurred, while in-state manufacturers were granted such an offset, thus disfavoring the out-of-state manufacturers who competed for sales in Washington." Br. 28-29. But Florida's tax can be described identically, merely by substituting "Florida" for "Washington" and "domiciliary" for "manufacturer": "Florida requires all out-of-state domiciliaries to pay a tax when they finance a sale of goods in the state, without offset for any domiciliary tax they incur, while in-state domiciliaries are granted such an offset, thus disfavoring the out-of-state domiciliaries who compete for financing business in Florida." The state's own description of *Tyler Pipe* thus demonstrates that the facially discriminatory feature of the Washington tax infects the Florida tax as well.

The state argues that a different result is warranted here because Florida's bifurcated "business situs" tax, unlike the West Virginia and Washington taxes, supposedly "contains no pertinent exemptions." Br. 27-28. While neither the Florida statute as written nor the state's reconstruction of it uses the word "exemption," Florida domiciliaries pay either the "domiciliary" tax or the "business situs" tax, but never both. Whether that reduced exposure to taxation is called an "exemption" or something else is of no consequence. Indeed, as far as the Court's opinions reveal, neither of the offending statutes in *Armco* and *Tyler Pipe* used the word "exemption."[3]

Florida's claim that its "business situs" tax "readily passes the internal consistency test" (Br. 28) does not distinguish this case from *Tyler Pipe*. Washington's wholesaling tax, considered in isolation from the manufacturing tax, likewise would have passed the internal consistency test: if every state adopted a wholesaling tax identical to Washington's, interstate wholesalers would bear no greater tax burden than would intrastate wholesalers. But *Tyler Pipe* squarely rejects Florida's unstated premise. The Court's decision demonstrates that internal consistency analysis is not conducted in a vacuum. When the interaction of two different taxes confers on intrastate commerce an exemption or other benefit that is unavailable to interstate commerce, the Court views the taxes together.

[3] The West Virginia statute provided that a local manufacturer "shall not be required to pay" the wholesaling tax. 467 U.S. at 640 n.3. The Washington statute provided that persons taxable under the wholesaling tax "shall not be taxable" under the manufacturing tax. 483 U.S. at 237 n.8.

III. THE INTERNAL CONSISTENCY TEST SERVES AN IMPORTANT ROLE IN PROTECTING INTERSTATE COMMERCE FROM DISCRIMINATORY STATE TAXES

Florida repeatedly impugns this Court's internal consistency test as a "mechanical" abstraction that ignores real economic effects. (*E.g.*, Br. 18, 34, 36, 37. At the core of its objection is the mistaken notion that the *risk* of multiple state taxation is a merely "hypothetical" injury that constitutes "no actual impediment to interstate commerce." Br. 34. As this Court often has recognized, however, the free trade purpose of the Commerce Clause is jeopardized when "[i]nterstate commerce [is] subjected to the *risk* of a double tax burden to which intrastate commerce is not exposed." *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311 (1938) (emphasis added). *See also, e.g., Central R.R. v. Pennsylvania*, 370 U.S. 607, 612 (1962); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949); *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 662-63 (1948); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 439-40 (1939).

There are several reasons for that rule. First, risks are not cost-free. An interstate business that faces the potential burden of multiple taxation must price its goods or services to reflect that possibility. If its intrastate competitors face no comparable risk, the company may suffer a competitive disadvantage that would discourage it from engaging in interstate commerce. As Justice Rutledge observed, the "uncertainties" resulting from the "threat" of multiple taxation can produce "the same impeding consequences" as the actual incidence of multiple taxation. *Freeman v. Hewit*, 329 U.S. 249, 274 (1946) (Rutledge, J., concurring).

That observation is particularly apt here. In the financial services industry, where the difference between success and failure often is measured in terms of a "basis point" (one hundredth of one percent in the yield

of an investment), the risk that more than one state will seek to tax the full value of an intangible asset imposes a real cost that can affect the way companies conduct their business. Florida's insensitivity to that cost is revealed in its assertion that a tax of one mill is "small." Br. 34 n.26. But a mill is the equivalent of 10 basis points. In a highly competitive environment, a company that must bear the risk of a second or third such "small" tax may be significantly handicapped. Thus, when Ford competes with local Florida banks for retail financing contracts (J.A. 11), it must factor into the calculation of its return the prospect that another state might, during the life of the contract, impose an annual tax like Florida's on the same intangible asset. Because the local bank bears no comparable risk, it enjoys a cost advantage that may give it a decisive competitive edge.[4]

Second, the risk of multiple taxation is likely to become a reality if this Court sustains an internally inconsistent tax like Florida's. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963). A state tax approved by this Court serves as a convenient recipe for other states seeking new revenue sources, because "[i]f [one state] is free to exact . . . a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured." *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. at 439. *See also McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 48 (1940). That is why "[t]he jurisdiction of [one state] to tax 'must be determined on a basis which is consistent with the like jurisdiction of other States.' "

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[4] The unfairness of Florida's tax is exacerbated by a provision of the Florida Income Tax Code that allows banks a dollar-for-dollar credit against their franchise tax liability for any intangible property taxes paid under the provisions at issue in this case. Fla. Stat. § 220.68 (1983). (The credit was limited to 40 percent of the bank's franchise tax liability during the years in issue. The limit was recently increased to 65 percent.) The upshot is that Florida not only protects local banks against the risk of *double* taxation on its intangibles, but also effectively insulates them even from *single* taxation.

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 326 (1944) (Stone, C.J., dissenting) (quoting *Johnson Oil Ref. Co. v. Oklahoma*, 290 U.S. 158, 162 (1933)).

Finally, to hold that only the actual imposition rather than the inherent risk of double taxation warrants invalidating a state tax "would mean that the constitutionality of [one state's] tax laws would depend on the shifting complexities of the tax codes of 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated." *Armco*, 467 U.S. at 644-45.

Florida's claim that Ford seeks to "extend" the internal consistency test beyond its proper bounds (*e.g.*, Br. 17, 26, 30) is actually a thinly veiled assault on the test itself. The scope and application of the test have been thoroughly debated in the Court's recent opinions, and Florida's arguments are largely indistinguishable from the views expressed by the dissenting Justices in those cases. The state argues, for example, that applying the internal consistency test is "contrary to the practical, realistic approach reflected in *Complete Auto*" (Br. 18)—a point that echoes the dissenting opinion in *Armco*, 467 U.S. at 648 (Rehnquist, J., dissenting). Similarly, Florida questions the soundness of the internal consistency test because it would eliminate some but not all risk of double taxation (Br. 18)—an argument that draws upon the dissenting opinion in *Tyler Pipe*, 483 U.S. at 258-59 (Scalia, J., dissenting), and that we addressed in our opening brief (pp. 27-28).

Applying the internal consistency test here requires no extension of the doctrine. To the contrary, the concerns that some Justices have expressed about previous applications of the test are not present in this case. For example, Florida's statute, like those in *Armco* and *Tyler Pipe*, is facially discriminatory—it overtly insulates from multiple taxation only the state's own domiciliaries who confine their activities within the state's boundaries. The Court therefore need not go as far as it did in *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987), where

it applied the internal consistency test to invalidate a flat highway tax that concededly was "*not* . . . facially discriminatory." *Id.* at 281 (emphasis added). *Compare id.* at 302-03 (O'Connor, J., dissenting) (objecting to use of internal consistency test where tax is not facially discriminatory) *with Tyler Pipe*, 483 U.S. at 253 (O'Connor, J., concurring) (agreeing with use of internal consistency test where tax is facially discriminatory).

Furthermore, the intangible property tax at issue here, unlike the transactional taxes at issue in *Armco* and *Tyler Pipe*, resembles an income tax in the sense that property, like income, can have only a single, unitary value. If more than one state contributes to that value and therefore has jurisdiction to tax it, the internal consistency test plays an important role in protecting the asset from taxation on more than 100 percent of its value. This is a far clearer case for applying an internal consistency analysis than a case involving a tax on "discrete events" where "there is simply no unitary figure or event to apportion." *Tyler Pipe*, 483 U.S. at 256 (Scalia, J., dissenting). *See also Armco*, 467 U.S. at 648 (Rehnquist, J., dissenting).

Even Florida grudgingly acknowledges in the end that the internal consistency test has a proper function. It admits that, "when a state puts forward a basis of taxation, it must be internally consistent in following the logic of that basis of taxation." Br. 36; *see also* Br. 18, 29, 30. That concession is fatal to the state's case, because Florida does *not* follow the logic of its statute. By taxing the full value of all intangibles owned by its domiciliaries, regardless of business situs, Florida asserts a theory of taxing jurisdiction under which the state of domicile alone provides the benefits and protections that give rise to intangible values. It is utterly inconsistent with the logic of that theory for Florida simultaneously to tax intangibles owned by *non*-domiciliaries under a "business situs" theory. If a domiciliary state may tax intangible values in full because it alone contributes to

the creation of those values, a business situs state may tax those values not at all. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 443 (1979). Alternatively, if Florida's theory were that both a domiciliary state and a business situs state contribute to the value of intangible property and therefore that both can tax them, the "logic" of its tax would require an apportionment mechanism that its current statute lacks.

IV. THE COMMERCE CLAUSE DOES NOT PERMIT MULTIPLE TAXATION OF INTANGIBLES THAT ARISE OUT OF INTERSTATE COMMERCE

That brings us to Florida's final and most extreme argument. The state flatly asserts that "double taxation [of intangibles] is entirely consistent with constitutional principles." Br. 31. If so, under the state's analysis, the internal consistency test, which is designed to prevent double taxation of interstate commerce, should have no application to an intangible property tax.

The state's theory is that in the case of intangibles, which have no single identifiable situs, "domicile and situs states afford different protections, benefits, and privileges for which each may demand a return." Br. 31. But it hardly follows that each may demand an *unapportioned* return. As this Court stated in *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 446 (1980)—a case that involved income from intangible property—when an object of taxation "bears relation to benefits and privileges conferred by several States, . . . apportionment is ordinarily the accepted method." Long before *Mobil*, the Court applied the same apportionment principle to a tax on the intangible property itself. In *Adams Express Co. v. Ohio State Auditor*, 166 U.S. 185 (1897), the Court held that intangible property may be taxed by states other than the owner's state of domicile. Because a number of different states may contribute a "proportionate share of the value of the entire property," the owner may be subject in each state to "such burden of taxation as a *fair distribution* of the actual value of their property among those states requires." *Id.* at 224, 225 (emphasis added).

Florida's mistaken notion that intangible property may be subjected to multiple unapportioned taxation can be traced to three principal misconceptions. First, it misreads several of this Court's due process decisions, erroneously inferring that they excuse states from any need to apportion a tax on intangible property. Br. 23. As we discussed in our opening brief (pp. 36-38), the issue in the due process cases was jurisdictional—whether a non-domiciliary state had a sufficient connection with intangible property to levy a tax either on the property itself, *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 221 U.S. 346 (1911); *Metropolitan Life Ins. Co. v. New Orleans*, 205 U.S. 395 (1907), or on its transfer at death. *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942); *Curry v. McCanless*, 307 U.S. 357 (1939); *Blackstone v. Miller*, 188 U.S. 189 (1903). In none of these cases did the Court consider or decide any issue of apportionment, and in none did it address any question under the Commerce Clause.[5]

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[5] The state also relies (Br. 17, 30-31, 33) on several individual income tax cases in which the Court upheld the authority of a state either to tax in full the income of residents from both in-state and out-of-state sources, *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937); *Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932), or to tax the income of non-residents from their property or business within the state. *Shaffer v. Carter*, 252 U.S. 37 (1920). The focus of each case was on territorial taxing jurisdiction under the Due Process Clause. No question of apportionment was considered or addressed in any of them. The only mention of the Commerce Clause was in *Shaffer*, where the Court rejected a subsidiary argument predicated on the assumption any tax on interstate commerce would be invalid. *See id.* at 57.

Florida makes much of its observation (Br. 33) that the statute in *Shaffer* was internally inconsistent—the state there taxed both the income of its resident individuals from all sources and the income of non-resident individuals from sources within the state. *Id.* at 44-45. But the decision is of no use to Florida here. First, the multiple burdens doctrine and the internal consistency test derive from the Commerce Clause, and the taxpayer in *Shaffer* did not raise a Commerce Clause objection to the internally inconsistent feature of the statute. Second, the same statute today, if applied to a multistate business enterprise, would be struck down under both

Second, the state wrongly believes that, under this Court's decisions, "multiple taxation is permissible" when "attributable to a state's special power to tax on the basis of domicile." Br. 30. In the words of Chief Justice Stone, however, "[w]hile the existence of a business domicile has been thought to afford a basis for the state taxation of intangibles, on the theory that they have become localized there, . . . the taxation of intangibles of interstate [companies] is subject to the rule of apportionment *wherever the tax without it would subject the commerce to the burden of multiple state taxation.*" *Northwest Airlines, Inc. v. Minnesota*, 332 U.S. at 318 (Stone, C.J., dissenting) (emphasis added) (citing *Southern Ry. v. Kentucky*, 274 U.S. 76, 81 (1927); *Wallace v. Hines*, 253 U.S. 66, 69-70 (1920); *Meyer v. Wells, Fargo & Co.*, 223 U.S. 298, 300 (1912); *Fargo v. Hart*, 193 U.S. 490, 499 (1904); *Adams Express Co. v. Ohio State Auditor*, 166 U.S. at 223-25).[6]

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due process and Commerce Clause principles, which prohibit a state from taxing without apportionment income derived from sources both inside and outside the taxing state's borders. *See, e.g., Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 164 (1983); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. at 445-46; *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Finally, to the extent that *Shaffer* can be construed to have approved under the Commerce Clause an internally inconsistent income tax, its authority must be questioned in light of this Court's recent internal consistency decisions.

[6] The Court in *Northwest Airlines* upheld, under a version of the "home port" doctrine, an unapportioned Minnesota tax on the entire fleet of airplanes used by a Minnesota domiciliary in interstate commerce. The rationale of the decision was substantially eroded in *Braniff Airways, Inc. v. Nebraska Bd. of Equalization*, 347 U.S. 590 (1954), which held that a non-domiciliary state could impose an apportioned tax on the value of an interstate air carrier's flight equipment. The "home port" doctrine, at least for moving equipment other than oceangoing vessels, "has yielded to a rule of fair apportionment among the States." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 442. The Court has treated Chief Justice Stone's dissenting opinion in *Northwest Airlines* as an accurate statement of current Commerce Clause doctrine. *Id.* at 443, 452 n.17, 455.

Third, Florida is under the mistaken impression that "the Commerce Clause has never before even been applied to an intangible property tax." Br. 33 n.25; *see also* Br. 23 n.15. On the contrary, this Court long ago invalidated under the Commerce Clause a property tax that purported to reach intangible values not properly within the state's taxing jurisdiction, thereby "throw[ing] an unconstitutional burden on commerce among the states." *Fargo v. Hart*, 193 U.S. at 502. And in *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891)—a case that Florida simply ignores in its brief—the Court applied an early version of internal consistency analysis in upholding against Commerce Clause challenge an ad valorem tax on a company's capital stock, an asset that includes intangible values.

In sum, there is no basis in this Court's precedents for Florida's assertion that intangible property should be left open to multiple state taxation. When interstate commerce is subject to "cumulative burdens not imposed on local commerce"— regardless of whether the burden attaches to income, to discrete transactions, or to tangible or intangible property—the effect is to "renew the barriers to interstate trade which it was the object of the commerce clause to remove." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 256 (1938). Intangible property that arises out of interstate commerce and has taxable connections with several states is entitled under the Commerce Clause to the same immunity from discriminatory double taxation that any other object of taxation enjoys.

V. THIS COURT HAS APPELLATE JURISDICTION

When Congress eliminated the appellate review provision of 28 U.S.C. § 1257(2) (1982), it provided that the amendment "shall not affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before [the amendment's] effective date." Pub. L. No. 100-352, § 7, 102 Stat. 664 (1988). Under the terms of that savings clause, this Court has

appellate jurisdiction if the "judgment or decree" under review was "entered" before September 25, 1988. Because the judgment under review in this case was entered by the Florida District Court of Appeal on September 13, 1988, this Court's jurisdiction over the appeal was not affected by the 1988 amendment.

At the jurisdictional stage, the state argued that the judgment of the Florida District Court of Appeal was not "entered" for purposes of the savings clause until after rehearing was denied by that court. Motion to Dismiss or Affirm at 10-12. In its brief on the merits, the state expressly abandons that argument (Br. 3 n.1) and substitutes a new one. Florida now asserts that the "judgment or decree" under review, for purposes of the savings clause, is not the District Court of Appeal's judgment of September 13, 1988, but rather the Florida Supreme Court's denial of discretionary review on February 22, 1989. Br. 4-5.[7]

Florida correctly acknowledges that "the state court 'judgment[] or decree[]' that is 'reviewed' under Section 1257 in circumstances like the present is the final state court decision on the merits, even if rendered by an intermediate appellate court, and not the denial of discretionary review by the state supreme court." Br. 3. *See, e.g., Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-60 (1954); *American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923). The state accordingly concedes that, if the phrase "judgment or decree" as used

[7] Both arguments flatly contradict the state's prior assertion in the Florida Supreme Court that the case falls within this Court's mandatory appellate jurisdiction. The state opposed Ford's petition for discretionary review in the Florida Supreme Court on the ground that the constitutional issue should be left for resolution by this Court. Central to the state's argument was its unqualified declaration that Ford "will be free to file a direct appeal (not a petition for certiorari)" and that "[t]his appeal will consist of a review on the merits regardless of whether the U.S. Supreme Court grants oral argument." Brief of Respondent on Jurisdiction at 8 (Nov. 28, 1988). The state was right then and is wrong now.

in the savings clause "were to borrow its meaning" from 28 U.S.C. § 1257, "the appeal here would be proper." Br. 3. The state argues, however, that the savings clause should be understood to "borrow its meaning" instead from 28 U.S.C. § 2101(c). Under its theory, because the time for taking an appeal "does not begin to run in circumstances like the present until the denial of discretionary review by the state supreme court," that denial, rather than the intermediate appellate court's final decision on the merits, constitutes the "judgment or decree" for purposes of section 2101(c) and, derivatively, for purposes of the savings clause as well. Br. 3-5.

The argument is unsound. First, when Congress uses a phrase in an *amending* statute that is identical to a phrase in the *amended* statute, one may reasonably infer that it intended the two phrases to have the same meaning. 1A *Sutherland Statutory Construction* § 22.33, at 288 (4th ed. 1985); *see Pierce v. Underwood*, 487 U.S. 552, 567-68 (1988); *Blair v. Chicago*, 201 U.S. 400, 454-55 (1906). The legislation that eliminated this Court's appellate jurisdiction amended section 1257, not section 2101(c). The terms of the savings clause confirm that Congress meant to refer to the former rather than the latter. It preserves the "right to review" and the "manner of reviewing" a judgment, subjects dealt with by section 1257. It says nothing about the time for reviewing a judgment, the only subject dealt with by section 2101(c). There is no reason to suppose that Congress meant to refer in the savings clause to a "judgment or decree" different from the "judgment or decree" that would have been appealable under former section 1257.

Second, the state misapprehends this Court's decisions under section 2101(c). The Court has not construed the phrase "judgment or decree" as used in that section to mean an order denying discretionary review. It has held

only that, for obvious pragmatic reasons, the time for taking an appeal or filing a petition for a writ of certiorari is "tolled" or "suspended" while a petition for discretionary review, or a petition for rehearing, is pending. *E.g., Communist Party v. Whitcomb*, 414 U.S. 441, 445 (1974); *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942); *American Ry. Express Co. v. Levee*, 263 U.S. at 21. This Court's Rule 13.1 codifies that principle. It provides that a petition for a writ of certiorari seeking review of a judgment of a lower state court "shall be deemed in time" if filed within 90 days after entry of an order denying discretionary review. A "tolling" or "deeming" rule does not amount to a determination that the phrase "judgment or decree" refers to the state supreme court's order denying discretionary review rather than the intermediate court's judgment on the merits.

Congress could have drawn a different line. It might have preserved only those appeals actually docketed before the new legislation's effective date. It might even have adopted Florida's more obscure approach and saved only those appeals in which a "still-partly-inchoate right of eventual review" had "fully ripened" by the effective date. Br. 4. But it chose instead a bright-line test that focuses solely on the date of the judgment to be reviewed by this Court. If that judgment was entered before the amendment's effective date, as it was in this case, this Court has jurisdiction over the appeal.[8]

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[8] Even if the Court were to conclude that appeal does not lie under section 1257, it would be free to decide the merits under its certiorari jurisdiction. Given the importance of the Commerce Clause issue, the tension between the decision below and this Court's precedents, the state's belated objection to appellate jurisdiction (after it successfully urged the contrary position below), and the fact that the case has now been fully briefed, it is plainly appropriate for the Court to proceed with plenary review. *Cf. City of Canton v. Harris*, 109 S. Ct. 1197, 1202-03 (1989); *St. Louis v. Prapotnik*, 485 U.S. 112, 120-21 (1988); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

CONCLUSION

The judgment of the Florida District Court of Appeal should be reversed.

Respectfully submitted,

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